No. 179.

Brief of Helm & Bruce for D. E.

Filed Jan. 16, 1897.

Office Supreme Court, U.S.
FILED
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

Louisville Water Company, ... Plaintiff in Error,

versus

Commonwealth of Kentucky, . . . Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

JAMES P. HELM,
HELM BRUCE,
Counsel.

Supreme Court of the United States.

LOUISVILLE WATER COMPANY . . . . . *Plaintiff in Error,*

vs.

COMMONWEALTH OF KENTUCKY . . . *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

Suit was brought by the Commonwealth of Kentucky and H. A. Bell, Sheriff, against the Louisville Water Company in January, 1891, seeking to collect from the Water Company taxes due the State for the year 1886. The property had not been assessed in 1886, but was subsequently, in 1891, reported by the Sheriff as "omitted property," and was thereupon assessed as of January 10, 1886. And this action was brought to collect the taxes due upon that assessment.

At the time this assessment was made and this action instituted, January, 1891, there was in effect a general revenue statute, approved May 17, 1886, and which is commonly known in the legislative and judicial history of Kentucky as the "Hewitt Act." (General Statutes of Kentucky, editions of 1887 and later, chapter 92.) But the tax involved in this action, being the tax for the year 1886, had been imposed as of the 10th of January of that year under and by the law in force prior to the adoption of the Hewitt Act of May 17, 1886; and, accordingly, the amount claimed as taxes due from the Water Company for the year 1886 was ascertained according to the rate of taxation which prevailed on January 10, 1886, which was 51½ cents on each $100 of value. (Record page 2.) Though the act of May 17, 1886, imposed a tax rate of 47 cents on each $100 of value. (Appendix I.) And the tax rate in force for the year 1891, the year the assessment was actually made by the Sheriff, was 42 cents on the $100 of value. (Appendix II.)

The defendant Company made a number of defenses to the action.

Among other defenses, it claimed that the Hewitt Act of May 17, 1886, had repealed all prior taxing statutes, and hence had released the defendant from its obligation to pay the tax of 1886, if any such obligation had ever existed. To this the Court of Appeals of Kentucky responded by calling attention to the fact this Hewitt Act "expressly excepted all obligations incurred under existing laws from repeal." (Record page 27.)

Defendant also contended that by an act of the Legislature of Kentucky, approved April 22, 1882, and accepted by defendant, its property had been exempted from taxation; and that thereby a contract of exemption had been made with the State; and that defendant's property was therefore not subject to taxation in 1886. Upon this question the Court of Appeals simply held that this exempting Statute had been held to be unconstitutional by the Court of Appeals in the case of Clark, Sheriff, vs. the Louisville Water Company, 90 Ky. 515; and hence this defense was not maintainable. (Record page 27).

Other defenses were made which it is not material now to mention; but all of which were overruled by the Court of Appeals, and the judgment of the lower court in favor of the State for the amount of the tax was affirmed. And the Water Company has now brought the case to this court by writ of error.

The plaintiff in error is the same corporation which was plaintiff in error in the case of the Louisville Water Company vs. Commonwealth of Kentucky, heretofore decided by this court, the opinion being reported in 143 U. S. 1. There is this difference, however, between that case and this one. That case involved the tax for the year 1887, the year subsequent to the passage of the Hewitt Act; while the present case involves the tax of 1886, which accrued prior to the passage of the Hewitt Act. And the point upon which this court decided the case involving the tax of 1887, was that the Hewitt Act by its terms repealed all exemptions from taxation, including the exemption of the Louisville Water Company; and that the legislature had the lawful power to make the repeal; so that there was therefore no ground for the company's refusal to pay the tax of 1887. That question of course does not arise in the present case, because, as just explained, the tax now involved accrued prior to the passage of the Hewitt Act, and that act did not purport to be retrospective in the effect of its repealing clause. But the Court of Appeals, following one of its own previous decisions, held that the original act of exemption was unconstitutional and void.

Defendants in error have moved to dismiss the writ of error for want of jurisdiction in this court, and have coupled with that motion a further motion to affirm as a delay case.

The Water Company attempted to make a federal question by its answer in the State court as follows: After having stated with great detail the passage of the exempting Statute of April 22, 1882, and the Company's acceptance thereof, and performance of obligations thereunder, and etc., it then made the following statement:

"And this defendant further answering, says that the alleged and pretended assessment set up and asserted in the petition in this action have for their authority an act of the General Assembly of the Commonwealth of Kentucky, approved upon the 17th day of May 1886, and entitled an Act to amend the revenue laws of the Commonwealth of Kentucky, and said pretended assessment and levy asserted and set up in the petition, and sought to be enforced herein has no other countenance or authority than the said Act hereinbefore referred to as approved the 17th day of May 1886.

"And the defendant says that the said Act of May 17, 1886, furnishes the only authority for the pretended and alleged assessment and levy set up and asserted in the petition in this action.

"And this defendant relying upon its said contract as herein before set out, and as evidenced by the act hereinbefore referred to as approved on the 22nd day of April 1882, avers and says that in so far as the said act approved on the 17th day of May 1886, seeks to authorize, justify or countenance an assessment of, or levy of a taxation upon the property of this defendant that said act approved May 17, 1886 is in violation of the constitution of the United States for the reason that the same impairs the obligation of the contract of the Commonwealth of Kentucky hereinbefore set out by the act hereinbefore referred to as approved April 22, 1882." (Record 11.)

ARGUMENT ON MOTION TO DISMISS.

By the allegations of the answer just quoted, the defendant Company has made an attempt to raise a federal question on the record. As said by this Court in Hamblin vs. Western Land Company, 147 U. S., 532, "A real, and not a fictitious, federal question, is essential to the jurisdiction of this Court over the judgments of State courts." Let us then look carefully at the question attempted to be stated in this answer.

As to the allegation that the Act of May 17, 1886, furnishes the only authority for the "*levy*" of the *tax* (as distinguished from the *assessment* of the *property*) the allegation is not true, as the record and the acts above referred to plainly show. The act of May 17, 1886, does not attempt to make a levy of taxes for any time preceding the taking effect of the act. The levy of taxes for such antecedent time was provided for by other acts, the rate of taxation being fixed by them; and the act of May 17, 1886,

simply provided that nothing therein contained should operate as a repeal of any obligations or penalties incurred under any existing law; (Article 12, Section 7, Appendix I.), and although it was insisted in the Court of Appeals by plaintiff in error that this Act had discharged all pre-existing obligation (if any there was) to pay this tax, levied as of January 10, 1886, yet the Court in its opinion denied the truth of this proposition, simply calling attention, with reference to the act, to the fact that "it expressly excepted all obligations incurred under existing laws from repeal," and saying, "It is, therefore, clear that if appellant had become liable for the tax of 1886, the act *supra* did not release it from such liability." (Record 27). And while the Court says it does not agree with appellant that the act is only prospective, yet it is plain that the Court there refers to the matter of going back and *assessing* property which had been ommitted in the preceding years, and not to the matter of levying a tax for preceding years; for the amount of tax for which judgment was given was, as heretofore stated, according to the rate in force for the year 1886, prior to the adoption of the act of May 17, 1886, viz.: 51½ cents on the $100; whereas, the rate fixed by the said act of 1886 was 47 cents upon the $100, and the rate in force in 1891, when the assessment was actually made, was 42 cents on the $100. We repeat, therefore, that the statement in the answer, to the effect that the act of May 17, 1886, furnishes the only authority for the levy of the tax asserted in the petition, is plainly not true; and no such authority was asserted or found, either by the Commonwealth as plaintiff in the action, or by the Court of Appeals in sustaining the tax.

Let us consider, then, the other allegation, to-wit, that this act of May 17, 1886, furnishes the only authority for the assessment of the property set up in the petition; and let us see what is the effect of this allegation, if true, in the matter of raising a federal question. It is true that this act provided that the Sheriff should report for assessment any property which had been omitted, and that the Court construed this to apply to years preceding the adoption of the act, as well as to succeeding years. This resulted simply from the fact that the act of May 17, 1886, was a general law intended to cover the whole subject of revenue and taxation, intended to make a complete law for the State upon that subject; and unless the State was willing to release all obligations to pay taxes which had theretofore been levied upon property, which had been omitted from the assessment rolls by the officers whose duty it was to report the same, it was necessary in adopting this new general law to make provision for assessing this previously omitted property. There had been a similar provision in the preceding general law, as it had existed since 1873 (long prior to the adoption of the exemption statute of 1882), for which the Act of May 17, 1886, was intended as a substitute; this provision for the reporting of property by the Sheriff being substantially a mere repetition of a

similar provision in the preceding law. The similarity of the two provisions may be seen by placing the same in parallel columns, italicizing certain words in the new law which are not found in the old. The preceding law referred to is in the General Statutes, chapter 92 (adopted in 1873), and the particular provision mentioned is found in Article 8, Section 23. The provisions in the two acts are as follows:

GENERAL STATUTES, CH. 92, ART. 8, SEC. 23.	ACT OF MAY 17, 1886, ART. 6, SEC. 25.
It shall be the duty of the Sheriff to report to the County Clerk all lists of property omitted by the Assessor, who shall enter the same on the Assessor's books for his county, and certify the same to the Auditor on or before the last day of December in each year; and the said Sheriff shall have for his compensation for said assessment twenty five cents, and in addition to the fee, twenty-five per cent of the taxes realized on said assessment.	It shall be the duty of the Sheriff to report to the County Clerk all lists, or part of lists, of property *which may for any year or years have been* omitted by the Assessor, *and all property which corporations may have omitted for any year or years to have listed with the Auditor*, and said Clerk shall enter the same on the Assessor's book for his county, and certify the same to the Auditor on or before the last day of January in each year; and the said Sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent on the taxes realized on said assessment. But this section does not include property erroneously described by the Assessor.

It will be observed that the act of May 17, 1886, adds the words—not found in the original—"which may for any year or years have been," &c. This was only intended to make it entirely plain that the sheriff should have the power under this section to report omitted property, not only for the current year, but for preceding years. But exactly this same construction had been put upon the preceding law found in the General Statutes. In the case of Barbour vs. the Louisville Board of Trade, 82 Ky., 645, the sheriff in May, 1884, had reported property as omitted from the assessment rolls in the years 1880, 1881, 1882 and 1883; and in a suit brought to enjoin the collection of taxes based on this assessment the point was expressly made by the counsel for the Board of Trade, as appears in the points of counsel as reported (page 646), that the sheriff had no right to report property for "back taxes." And while the court in its opinion does not expressly refer to this point, yet it upheld the assessment and directed that the injunction which had been granted by the lower court should be dissolved and the petition dismissed.

Again it may be observed that the Act of May, 1886, contains the words (not in the General Statutes), "and all property which corporations may have omitted for any year or years to have listed with the Auditor." While these words were not in the General Statutes as originally adopted, and as quoted above, yet they were substantially embodied in an act approved April 22, 1884, by which the mode of assessing the property of corporations was changed; it being at the same time provided that Section 23 of Article 8 of the General Statutes as above quoted, as to the report of omitted property by the Sheriff, should be applicable to corporations which should fail to report their property for taxation. (Appendix III.)

We repeat therefore, that the provision in the act of May 17, 1886, authorizing and directing the Sheriff to report for assessment any property which had been omitted for preceding years, was simply a substantial re-enactment of a similar provision contained in the immediately preceding general law on this same subject of revenue and taxation; and while it is true that the act of May 17, 1886, governed the sheriff in making the assessment involved in the case at bar, yet the same duty would have rested upon him under the preceding law, if the Act of May 17, 1886, or the Act of April 22, 1884 (which later act, however, is not relied on as impairing the obligation of the contract), had never been passed, and he had continued to act under the law as it existed prior to the passage of the exemption Statute of April 22, 1882, relied on by plaintiff in error as a contract.

But, suppose for the sake of argument, we are wrong in saying that the provision in the Act of May 17, 1886, directing the sheriff to report omitted property, is the same in substance as the act which existed prior to the passage of the exemption statute of 1882, upon which plaintiff in error relies as a contract. Still we insist that no federal question is raised by the action of the sheriff in assessing the property of the Louisville Water Company, or by the action of the Court of Appeals of Kentucky in upholding this proceeding on the part of the sheriff. We have already shown that the tax in question was not levied under the Act of May 17, 1886, upon which plaintiff in error relies as impairing the obligation of the contract contained in the act of April 22, 1882. That tax had been imposed by pre-existing law. The act of May 17, 1886, did not purport to repeal the act of exemption of April 22, 1882, upon which plaintiff in error relies as a contract, so far as the time *preceding* May 17, 1886, was concerned. It did purport to repeal this exemption, with all other similar exemptions, for the time *succeeding* the passage of the latter Act; and to the extent that it did purport to make this repeal this court has upheld it as a valid exercise of legislative power. (Louisville Water Company vs. Clark, 143 U. S. 1). But, as just stated, as to the period preceding the adoption of the act it made no attempt to repeal the

exemption; and therefore had no effect upon it one way or the other. It did not refer to it at all.

Clearly, therefore, it cannot be said that the act of May 17, 1886, impaired the obligation of the alleged contract contained in the act of April 22, 1882. It is impossible to understand how it can be said that a legislative act has impaired the obligation of a contract contained in a preceding statute when it makes no reference to the same, either expressly or by implication, either in general or specific terms.

But, as heretofore explained, the act of May 17, 1886, was a general revenue statute, and among other things it provided generally for the assessment by the Sheriff of any property liable to taxation for preceding years, but which had been improperly omitted from the assessment books. It made no attempt whatever to alter the pre-existing laws which had provided what property should be liable to taxation. It did not purport to affect that question in any manner; and it did not, in fact, do so. It only provided in general terms for the assessment, by a proper officer, of property which had been liable and was liable to taxation under the pre-existing laws, but which had been improperly omitted. This was all that was done by the legislative department of the State.

But the Sheriff, a ministerial officer, conceived that the property of the Louisville Water Company was liable for taxation under the laws as they existed prior to May 17, 1886. He conceived that the Act of April 22, 1882, purporting to exempt the property of the Louisville Water Company from taxation, was unconstitutional, and therefore that that property was and always had been subject to taxation by the State; and that, as it had not been assessed, and as no taxes had been paid upon it since April 22, 1882, it ought to be reported and assessed for taxation. And accordingly he did assess the same, and a suit was brought in the name of the Commonwealth and of the Sheriff jointly, against the Water Company, to recover the amount of the tax based on this assessment for the year 1886. And the lower court having given judgment in favor of the plaintiffs for the amount of the tax, the Court of Appeals affirmed that judgment.

If any wrong has been done the Louisville Water Company in disregard of its alleged contract contained in the Act of April 22, 1882, it has been done by the Sheriff, the ministerial officer, and by the Judges of the courts, being the judicial officers, of the State. *There has been absolutely no attempt on the part of the legislative department of the State to interfere with this alleged contract.* Such being the case, no federal question is presented.

It can not be said that the validity of the Statute of May 17, 1886, is in any sense drawn in question. As to the right of the Legislature of a State to direct that property liable to taxation under pre-existing laws, but which had been omitted from the

assessment books by accident or otherwise, should be assessed so that the taxes might be collected upon the same, this can not be doubted; and to deny this right, and in that way attempt to raise a Federal question, is to do exactly what this Court in the case already cited said could not be done. "The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation." (Hamblin vs. Western Land Company, 147 U. S. 532.)

It may be said, however, that the action of the Sheriff in assessing this property for taxation, upon the idea that the exempting Statute was unconstitutional, supported and maintained by the decision of the Court of Appeals, was, "an authority exercised under the State," and that this has been drawn in question on the ground of being repugnant to the constitution of the United States; and that as the decision of the State court was in favor of the validity of such authority, therefore a Federal question is presented.

But this manifestly can not be true. Of course every ministerial officer acts only by virtue of an authority under the State. And so every judicial officer acts only by virtue of an authority under the State. And this authority is always conferred by legislative action, either in the form of a constitution or statute; and this may be a new constitution or a new revision of the laws, adopted after the passage of some act which is claimed to constitute a contract. Thus the Court of Appeals which gave judgment for this tax was a court created by a constitution adopted in 1891, long after the passage of the exemption statute of 1882. And it may be said that the only authority for the existence of the court or of the sheriff who made the assessment, was the constitution of 1891; though it did not affect the question of defendant's liability, or exemption from liability to taxation. Yet it is perfectly evident, and this court has often so held, that the fact that a party complains of the action of a ministerial officer or of a court as being in violation of a contract right, does not raise a Federal question. The mere action of a ministerial officer, or a judicial officer, *under a statute which is itself valid*, will not be sufficient to raise such a question.

In New Orleans Water Works vs. Louisiana Sugar Company, 125 U. S., 30, this court said:

"In order to come within the provisions of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

The court conceded in the case just cited that legislative authority might be exerted otherwise than by the immediate action of the legislature of the State. Thus, that the legislature might authorize a municipal council to exercise certain legislative functions, as, for example, in the levying of municipal taxes; and that where this should be the case, the action of the council in making such a levy would be regarded as the enactment of a law by the State. It also recognized the fact that the enactment of what purported to be laws by the Confederate Government, and which were given the effect of laws in the several States of the Confederacy, were enactments of laws within the meaning of the Federal Constitution. But, while the case then immediately before the court was one in which a municipal ordinance of the city of New Orleans was attacked as being in contravention of an alleged contract right, yet the court said that the action of the City Council in the matter complained of was *not legislative in its character*, but was entirely ministerial, and therefore no federal question was thereby presented. In that case a legislative act of the State of Louisiana had granted to the New Orleans Water Works the exclusive right to furnish water to the city of New Orleans, providing however that nothing therein should "be so construed as to prevent the City Council from granting to any person or persons contiguous to the river the privilege of laying pipes to the river exclusively for his or their own use." Subsequently the City Council, by the ordinance complained of, did grant to the Louisiana Sugar Company the right to lay pipes to the river for its own use, it being contended that the property of this company was "contiguous to the river." It was insisted by the Water Company that this property was not contiguous to the river; and that therefore this ordinance was in violation of the contract between the Water Company and the State as contained in the legislative act referred to. But this court held that the City Council, although exercising authority under the State (for all municipal councils do this), and although acting by virtue of the authority granted to it by the legislative act which had created the contract, yet did nothing more than determine for itself that this property of the Sugar Company did lie contiguous to the river; and that, as this was *a purely ministerial action, and in no sense legislative in its character*, therefore, although the action was taken by a body which in many respects had legislative powers, yet the action complained of was not a legislative action, and therefore raised no federal question.

So in the case at bar. So far as the legislative act of May 17, 1886, is concerned it certainly attempted to do nothing except what the legislature had power to do, viz, to direct its officers to assess any property which had been liable to taxation under pre-existing laws, but which had been improperly omitted from the assessment books. And the action of the Sheriff in determining

for himself that the property of the Louisville Water Company was liable to taxation, under the law as it existed prior to May 17, 1886, and the action of the courts in upholding this action on the part of the Sheriff, were of course not legislative acts in any sense of the word, and therefore do not present any federal question.

We suppose the principle to which we have referred, to wit, the necessity for *legislative* action by the State in order to raise a federal question based on contract rights, is so thoroughly understood as not to need an extensive citation of authorities. We may however, refer to a very late case on the same subject in Central Land Company vs. Laidley, 159 U. S. 109, where this court said:

"In order to come within the provision of the constitution of the United States, which declares that no State shall pass any law impairing the abligations of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only."

As to that provision of the judiciary act which confers authority upon this Court, where there is drawn in question the validity "of an authority exercised under a State," as being repugnant to the Constitution, laws or treaties of the United States, it must be remembered that, generally speaking, some instances of authority exercised under a State, in the various phases of social life and action, might be asserted to be repugnant to various provisions of the Constitution, laws or treaties of the United States; but in attempting to present a federal question in a given case it is necessary to show what provision of the Constitution the authority in the specific case is repugnant to; and when the *contract clause* of the Federal Constitution is pointed out as the provision to which the authority is repugnant, we find that that clause only protects against legislative authority. In other words, speaking with reference to the general language of the judiciary act, we mean to present the idea, that one may conceive that some case might arise in which a ministerial action might be justly claimed to be in violation of some right protected by the Constitution, laws or treaties of the United States; but when the right thus sought to be protected is a contract right, then we know that the only clause in the Constitution of the United States on the subject of protection of contract rights is that clause which provides in substance that no State shall pass any law imparing the obligation of a contract; and this clause of the Constitution has been held, as heretofore shown, to protect contract rights only against the legislative power of the States, and not against ministerial or judicial power or authority.

We, therefore, respectfully ask that the writ of error be dismissed for want of jurisdiction.

ARGUMENT ON MOTION TO AFFIRM.

If, however, this court should take jurisdiction of the action, we submit that the motion to affirm as a delay case should be sustained. The act of April 22, 1882, exempting the property of the Louisville Water Company from taxation was manifestly not a contract, either in substance or in form, and hence there is no ground upon which this court can reverse the judgment of the Court of Appeals of Kentucky.

The answer of plaintiff in error alleges that "it is a private corporation, and that all of its capital stock is now, and has at all times since the 3d day of March, 1870, been owned, held and possessed by the Board of Commissioners of the Sinking Fund of the City of Louisville." (Record 7.) And the act of exemption shows that it was not intended to be a contract, but was simply an attempt on the part of the legislature to exempt the property of the Louisville Water Company on account of the fact that it was in effect property of the City of Louisville, and ought therefore to be exempt from taxation as *public property*. The Act of exemption in its entirety reads as follows:

1. "That it shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the City of Louisville for fire protection free of charge.

2. "The Sinking Fund of the City of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the City of Louisville, *therefore* the Louisville Water Company is hereby exempted from the payment of taxes of all kinds of whatever character, State, municipal and special." (our italics) (2 Acts 1881, p. 915.)

The Court of Appeals in the present case gave no reason for its decision to the effect that this Act was unconstitutional; it simply referred to its former decision in Clark vs. Louisville Water Company, 90 Ky, 515, to establish that proposition. Referring then to the opinion of the court in that case, we see the view which it took of this exempting statute and which we submit is manifestly correct. In its opinion in that case the court said:

"We think it evident that the furnishing of water by the Company to the city for fire protection free of charge was not what induced the passage of the act. Its recitals, aside from the express statement in it of the reason, make this quite plain. It says: 'The sinking fund of the city of Louisville being *the owner of the stock of the Louisville Water Company, and said Water Company, by virtue thereof, is the property of the city of Louisville; therefore* the Louisville Water Company is hereby exempted from

the payment of taxes of all kinds of whatever character, State, municipal and special.'

"According to the legislative recital, the sinking fund of the city owns the entire stock of the Water Company. There is nothing in the record showing otherwise, and it must therefore be assumed to be true." (In the answer in the present action this is expressly averred to be true.) "While the sinking fund department is a separate corporation from that of the city proper, yet it is merely the money-making branch of the municipal government. It has charge of its funds and its investments, whether in bank, railroad, water company stocks, or other valuable and money-making securities.

"We see, therefore, that the property and rights of the Water Company belong to the city. While, therefore, the act recites that it shall be the duty of the Water Company to furnish water to the public fire cisterns and public fire-plugs or hydrants of the city for fire protection, yet this could not have been the consideration that induced the passage of the act, since it made no difference to the city whether a million of dollars or a penny might be paid for this service, because it was the owner of the rights and property of the Water Company, and it would, therefore, be but a payment to *itself*. It can not be supposed, therefore, that the legislature intended to relinquish over $10,000 of taxes annually in consideration that the city would not charge *itself* for water furnished by *itself*.

"It is useless to inquire why the act declares that the Water Company should furnish water to the city free of charge. Perhaps, as suggested by counsel, it was merely to avoid the trouble of keeping an account between the sinking fund department and the city proper. The reason which induced the attempted granting of the exemption must, therefore, have been, as indeed the act recites, that the sinking fund of the city, or, in other words, the city itself, owned all of the Water Company stock." (Court's italics.)

Such was the view of this Act of exemption taken by the Court of Appeals, and it was manifestly the correct one. The theory of counsel for plaintiff in error, upon which they seek to make a contract between the Water Company and the State is, that the State, recognizing its duty to furnish water to the city of Louisville as being a proper governmental function of the State, contracted with the Louisville Water Company to perform this duty for the State as the agent of the State, and agreed to pay it for the service by exempting its property from all kinds of taxation. But a consideration of the relations of the several parties to this supposed contract, and the very recitals in the act itself, show that the State had no such purpose in view. It simply regarded this property as the property of the city of Louisville, and considered that it should be exempted from taxation as *public property;* and fur-

thermore considered that it was useless for one department of the city to continue to pay money into another department of the city for services rendered by the city to itself; and hence it directed that such charges and payments should thereafter cease. The assets of the sinking fund, which is a mere department of the city government, being exempted from taxation by this Act, and being thus largely increased in value, the legislature doubtless felt that, as a means of equalizing the general funds of the city with the sinking fund of the city, it was proper to stop the payments from the general fund to the sinking fund; thus making compensation to the general fund for the large benefit granted to the sinking fund by the exemption of this property from taxation.

As heretofore said, this was evidently not intended by the legislature to be a contract with the Water Company to pay it for the performance of public services, but was simply an attempt to exempt this property from taxation on the ground that it was *public property*. And on the question of whether or not this was a valid ground of exemption from taxation under the Constitution of Kentucky, the Court of Appeals held that it was not. And its judgment upon that question of State law this Court has no power to revise.

It may be suggested that the creditors of the City of Louisville, those whose debts are chargeable upon the Sinking Fund, have an interest in the assets of the Sinking Fund (of which the stock in the Louisville Water Company is a part), and that their rights are impaired by the taxing of this property, contrary to the provisions of the act of exemption. But no creditors of the City of Louisville are complaining of this taxation; neither is the Sinking Fund of the City of Louisville complaining for them. No one is making any complaint except the Louisville Water Company. But certainly if the creditors do not complain, and the Sinking Fund does not complain, of any violation of the rights of these creditors, the Louisville Water Company has no right to raise the question for them. It has no interest in the question of whether the debts of these creditors of the City of Louisville are or are not paid. And, furthermore, if it were necessary to consult these creditors as to whether or not the State should tax this property of the Water Company, it would have been necessary to consult them and get their consent to the passage of the act of exemption of April 22, 1882, when (according to the construction of the plaintiff in error) the right to charge the City of Louisville for water furnished it by the Water Company was traded off for an exemption from taxation. Yet there is no suggestion that they were consulted about that Act. While there is a statement that the Water Company accepted that act, there is no statement that the creditors of the Sinking Fund ever did so. It is plain, therefore, that the creditors of the Sinking Fund have no interest in this controversy, and are not asserting any.

We submit, therefore, that the Act of April 22, 1882, was not a contract either in substance or in form, but was merely an attempt to exempt property from taxation on the idea that it was *public property;* and that the decision of the Court of Appeals of Kentucky to the effect that such exemption was not permissible under the laws of Kentucky, is not a decision which this court can revise; and therefore that the motion to affirm as a delay case, if this court takes jurisdiction of the controversy at all, should be sustained.

JAMES P. HELM,
HELM BRUCE,
Counsel for Defendants in Error.

December 1, 1896.

APPENDIX.

I.

HEWITT ACT OF MAY 17, 1886 (1 ACTS 1885–6, PAGE 140).

Article 1, Section 1: "That an annual tax of forty-seven cents upon each one hundred dollars of value of all real and personal estate directed to be assessed for taxation, due and payable the fiscal year assessed, shall be paid by the owner or person assessed."

Art. 12, Sec. 7: "That this Act shall take effect from and after September 14, 1886; but it shall not operate as a repeal of existing laws as to any assessment made, licenses granted, or obligations or penalties incurred under any existing law."

II.

ACT OF MAY 22, 1890 (1 ACTS 1889–90, PAGE 158).

SECTION 1. "That section one of article one of an Act, entitled "An Act to amend the revenue laws of the Commonwealth of Kentucky," approved May seventeenth, one thousand eight hundred and eighty-six, be, and the same is hereby, amended so as to substitute for the word "forty-seven," in the first line, the word "forty-two," and for the word "twenty," in the seventh line, the word "fifteen."

Sec. 2. This Act shall take effect from and after its passage."

Became a law, the objections of the Governor to the contrary notwithstanding, May 22, 1890."

III.

ACT OF APRIL 22, 1884 (1 ACTS 1883-4, PAGE 70).

Sec. 1. "That hereafter all corporations in this Commonwealth, except railroad and turnpike companies, shall, in the manner provided by article twelve, chapter ninety-two, of the General Statutes, list their property with the assessor of the county in which the corporate property is situated."

Sec. 4. "Sections twenty-three and twenty-four, of article eight, of chapter ninety-two, of the General Statutes, are hereby made applicable to all cases where any corporations may have heretofore failed, for any year or years, to list its property with the Auditor as now required, or may hereafter fail to list its property with the assessor as herein provided."